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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

THOMAS BRANAGAN,	Case No. 2:15-cv-01575-GMN-PAL
Petitioner,	
v.	AMENDED ORDER
ISIDRO BACA, <i>et al.</i> ,	
Respondents.	

Introduction

This action is a *pro se* petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, by Thomas Branagan, a Nevada prisoner. The respondents have filed an answer, responding to the claims in Branagan’s petition, and Branagan has filed a reply. The Court will deny Branagan’s petition.

Background

Branagan was convicted on December 27, 2010, after a jury trial, in Nevada’s Eighth Judicial District Court, in Clark County, of sexual assault with a minor under the age of fourteen, and he was sentenced to life in prison with the possibility of parole after 35 years. See Judgment of Conviction, Exhibit 3 (ECF No. 22-1). The conviction involved a sexual assault on Branagan’s girlfriend’s five-year-old granddaughter; the evidence indicated that, on an occasion when Branagan was babysitting the little girl, he put his penis in her mouth.

1 Branagan appealed. See Appellant's Opening Brief, Exhibit 4 (ECF No. 22-2). On
2 November 18, 2011, the Nevada Supreme Court affirmed Branagan's conviction and
3 sentence. See Order of Affirmance, Exhibit 18 (ECF No. 31-6).

4 On November 7, 2012, Branagan filed a *pro se* petition for writ of habeas corpus
5 in the state district court. See Petition for Writ of Habeas Corpus, Exhibit 5 (ECF No. 22-
6 3). On October 4, 2013, with counsel, Branagan filed a supplemental memorandum of
7 points and authorities in support of the petition. See Supplemental Points and Authorities
8 in Support of Post-Conviction Writ, Exhibit 6 (ECF No. 22-4). The state district court held
9 an evidentiary hearing. See Transcript, Exhibit 19 (ECF No. 31-7). The state district court
10 denied Branagan's petition on May 16, 2014. See Findings of Fact, Conclusions of Law
11 and Order, Exhibit 8 (ECF No. 22-6). Branagan appealed. See Appellant's Opening Brief,
12 Exhibit 9 (ECF No. 22-7). The Nevada Supreme Court affirmed on June 10, 2015. See
13 Order of Affirmance, Exhibit 12 (ECF No. 22-10).

14 This Court received Branagan's federal petition for writ of habeas corpus, initiating
15 this action, *pro se*, on August 17, 2015 (ECF No. 15). Branagan's petition asserts the
16 following grounds for relief:

17 1. Branagan received ineffective assistance of trial counsel, in violation
18 of his federal constitutional rights, because his trial counsel waived the
19 State's 10-day notice under NRS § 51.385. See Petition for Writ of Habeas
Corpus (ECF No. 15), p. 3.

20 2A. Branagan received ineffective assistance of trial counsel, in violation
21 of his federal constitutional rights, because his trial counsel failed to
22 investigate and pursue "a possible defense relating to his 'diminished
capacity' as a result of his ADA recognized disabilities and or
pharmacological regime (involuntary intoxication)." See *id.* at 5.

23 2B. Branagan's rights under the federal constitution were denied
24 because "Nevada's failure to recognize this affirmative defense of
25 'diminished capacity' is a denial of the Appellant's [substantive] and
procedural due process rights by denying [meaningful] access to the courts;
to wit being able to present his disability in the judicial process en toto as
provided under the [ADA]." See *id.*

26 3A. Branagan's rights under the federal constitution were denied
27 because he was denied his right to present evidence concerning his
28 disability. See *id.* at 7.

1 3B. Branagan received ineffective assistance of trial counsel, in violation
2 of his federal constitutional rights, because his trial counsel failed “to
determine that [he] was suffering from a disability.” See *id.*

3 3C. Branagan received ineffective assistance of trial counsel, in violation
4 of his federal constitutional rights, because his trial counsel failed “to
5 recognize that the ADA allowed [him] to delve into the details regarding [his]
6 mental illness and the side effects that the medications had on his state of
7 mind, for the purpose of furthering an argument regarding involuntary
8 intoxication.” See *id.* at 8.

9 4. Branagan received ineffective assistance of trial counsel, in violation
10 of his federal constitutional rights, “during [his trial counsel’s] cross-
11 examination of the State’s witnesses.” See *id.* at 10.

12 5. Branagan received ineffective assistance of trial counsel, in violation
13 of his federal constitutional rights, because his trial counsel “failed to object
14 to the testimony of victim’s mother, whose testimony was based upon 3rd
15 or 4th party hearsay and admitted to be perjured.” See *id.* at 12.

16 Respondents filed an answer on July 5, 2016 (ECF No. 19), and Branagn filed a
17 reply on March 6, 2017 (ECF No. 29).

18 On March 30, 2018, the Court ordered the record expanded, pursuant to Rule 7 of
19 the Rules Governing Section 2254 Cases in the United States District Courts. See Order
20 entered March 30, 2018 (ECF No. 30). The Court directed respondents to file, as exhibits,
21 certain items from the state court record. See *id.* Respondents filed the supplemental
22 exhibits on April 27, 2018 (ECF Nos. 31, 32 and 33). Branagan filed responses to the
23 expansion of the record on May 18 and 23, 2018 (ECF Nos. 34, 35). And, on June 14,
24 2018, Branagan filed a motion for appointment of counsel (ECF No. 37).

25 Branagan’s habeas petition is fully briefed and before the Court for resolution on
26 the merits of his claims.

27 Discussion

28 28 U.S.C. § 2254(d)

A federal court may not grant a petition for a writ of habeas corpus on any claim
that was adjudicated on the merits in state court unless the state court decision was
contrary to, or involved an unreasonable application of, clearly established federal law as
determined by United States Supreme Court precedent, or was based on an
unreasonable determination of the facts in light of the evidence presented in the state-

1 court proceeding. 28 U.S.C. § 2254(d). A state-court ruling is “contrary to” clearly
2 established federal law if it either applies a rule that contradicts governing Supreme Court
3 law or reaches a result that differs from the result the Supreme Court reached on
4 “materially indistinguishable” facts. See *Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam).
5 A state-court ruling is “an unreasonable application” of clearly established federal law
6 under section 2254(d) if it correctly identifies the governing legal rule but unreasonably
7 applies the rule to the facts of the particular case. See *Williams v. Taylor*, 529 U.S. 362,
8 407-08 (2000). To obtain federal habeas relief for such an “unreasonable application,”
9 however, a petitioner must show that the state court’s application of Supreme Court
10 precedent was “objectively unreasonable.” *Id.* at 409-10; see also *Wiggins v. Smith*, 539
11 U.S. 510, 520-21 (2003). Or, in other words, habeas relief is warranted, under the
12 “unreasonable application” clause of section 2254(d), only if the state court’s ruling was
13 “so lacking in justification that there was an error well understood and comprehended in
14 existing law beyond any possibility for fairminded disagreement.” *Harrington v. Richter*,
15 562 U.S. 86, 103 (2011).

16 Ineffective Assistance of Counsel

17 In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court propounded
18 a two prong test for analysis of claims of ineffective assistance of counsel: the petitioner
19 must demonstrate (1) that the attorney’s representation “fell below an objective standard
20 of reasonableness,” and (2) that the attorney’s deficient performance prejudiced the
21 defendant such that “there is a reasonable probability that, but for counsel’s
22 unprofessional errors, the result of the proceeding would have been different.” *Strickland*,
23 466 U.S. at 688, 694. A court considering a claim of ineffective assistance of counsel
24 must apply a “strong presumption” that counsel’s representation was within the “wide
25 range” of reasonable professional assistance. *Id.* at 689. The petitioner’s burden is to
26 show “that counsel made errors so serious that counsel was not functioning as the
27 ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Id.* at 687. And, to establish
28 prejudice under *Strickland*, it is not enough for the habeas petitioner “to show that the

1 errors had some conceivable effect on the outcome of the proceeding.” *Id.* at 693. Rather,
2 the errors must be “so serious as to deprive the defendant of a fair trial, a trial whose
3 result is reliable.” *Id.* at 687.

4 Where a state court previously adjudicated the claim of ineffective assistance of
5 counsel, under *Strickland*, establishing that the decision was unreasonable under AEDPA
6 is especially difficult. See *Harrington*, 562 U.S. at 104-05. In *Harrington*, the Supreme
7 Court instructed:

8 Establishing that a state court’s application of *Strickland* was
9 unreasonable under § 2254(d) is all the more difficult. The standards
10 created by *Strickland* and § 2254(d) are both highly deferential, [*Strickland*,
11 466 U.S. at 689]; *Lindh v. Murphy*, 521 U.S. 320, 333, n. 7, 117 S.Ct. 2059,
12 138 L.Ed.2d 481 (1997), and when the two apply in tandem, review is
13 “doubly” so, [*Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)]. The
14 *Strickland* standard is a general one, so the range of reasonable
applications is substantial. 556 U.S., at 123, 129 S.Ct. at 1420. Federal
habeas courts must guard against the danger of equating
unreasonableness under *Strickland* with unreasonableness under §
2254(d). When § 2254(d) applies, the question is not whether counsel’s
actions were reasonable. The question is whether there is any reasonable
argument that counsel satisfied *Strickland*’s deferential standard.

15 *Harrington*, 562 U.S. at 105; see also *Cheney v. Washington*, 614 F.3d 987, 994-95
16 (2010) (acknowledging double deference required with respect to state court
17 adjudications of *Strickland* claims).

18 In analyzing a claim of ineffective assistance of counsel, under *Strickland*, a court
19 may first consider either the question of deficient performance or the question of
20 prejudice; if the petitioner fails to satisfy one element of the claim, the court need not
21 consider the other. See *Strickland*, 466 U.S. at 697.

22 Ground 1

23 In Ground 1, Branagan claims that he received ineffective assistance of trial
24 counsel, in violation of his federal constitutional rights, because his trial counsel waived
25 the State’s 10-day notice under NRS § 51.385. See Petition for Writ of Habeas Corpus
26 (ECF No. 15), p. 3.

1 NRS § 51.385 provides:

2 1. In addition to any other provision for admissibility made by statute or rule
3 of court, a statement made by a child under the age of 10 years describing
4 any act of sexual conduct performed with or on the child or any act of
physical abuse of the child is admissible in a criminal proceeding regarding
that act of sexual conduct or physical abuse if:

5 (a) The court finds, in a hearing out of the presence of the jury,
6 that the time, content and circumstances of the statement
provide sufficient circumstantial guarantees of
7 trustworthiness; and

8 (b) The child testifies at the proceeding or is unavailable or
unable to testify.

9 2. In determining the trustworthiness of a statement, the court shall
10 consider, without limitation, whether:

11 (a) The statement was spontaneous;

12 (b) The child was subjected to repetitive questioning;

13 (c) The child had a motive to fabricate;

14 (d) The child used terminology unexpected of a child of similar
age; and

15 (e) The child was in a stable mental state.

16 3. If the child is unavailable or unable to testify, written notice must be given
17 to the defendant at least 10 days before the trial of the prosecution's
intention to offer the statement in evidence.

18 NRS § 51.385

19 Branagan asserted this claim in his state habeas action. The state district court
20 ruled as follows on the claim:

21 Defendant alleges that trial counsel was ineffective for waiving an
22 additional 3 days of the 10-day notice requirement under NRS 51.385(3)
after the court continued the trial 7 days to provide for adequate notice.

23 A waiver was proper strategic decision by trial counsel because not
24 waiving the 3 days would have been a futile act on trial counsel's part. A
25 review of the transcript from October 4, 2010, reveals that the court wished
26 to continue the matter briefly to avoid a possible procedural issue with the
27 notice and at the same time balance the Defendant's rights. R.T., October
28 4, 2010, pgs. 2-10. The week following the hearing was selected for
scheduling purposes because the trial was anticipated to last approximately
3 days and the court had 4 days open. *Id.* The transcript indicates that, while
oral notice was put on the record, the prosecutor also sent written notice to
trial counsel and which the court agreed would relate back to the October
1, 2010 date. *Id.* Therefore, Defendant's claim is belied by the record. The

1 record shows the court would have continued the trial anyway to
2 accommodate proper notice because it did so even when the State argued
3 that Defendant had all of the discovery and none of the statements would
be a surprise to defense. *Id.* The Court properly granted the continuance
and would have done so for a full 10 days if trial counsel had not waived the
3 days to accommodate the court's schedule.

4 Therefore, trial counsel cannot be ineffective for failing to take the
5 futile action of refusing to waive 3 days of the notice. Trial counsel did not
provide ineffective assistance of counsel.

6 For the same reasons, Defendant cannot show prejudice. Even if trial
7 counsel would not have waived the 3 days the district court would have
continued the trial at least 10 days, so that notice still would have been
8 proper and the testimony admissible. Additionally, the victim testified at trial
and was subject to cross examination. R.T., October 12, 2013, pgs. 185-
9 224. Therefore, the notice was not required under NRS 51.385 and the
testimony would have been admitted regardless of notice. Defendant's
10 allegations on this claim are insufficient to support a finding of prejudice for
the second *Strickland* prong which requires Defendant to show a
11 reasonable probability that, but for counsel's errors, the result would have
been different.

12 Findings of Fact, Conclusions of Law and Order, Exhibit 8, pp. 6-8 (ECF No. 22-6, pp. 7-
13 9); see Transcript of Trial, October 4, 2010, Exhibit 2A (ECF No. 20-2, pp. 2-11).
14 Branagan then asserted the claim on the appeal in the state habeas action, and the
15 Nevada Supreme Court ruled as follows:

16 ... Branagan contends that trial counsel was ineffective for waiving 3
17 days of the 10-day notice requirement under NRS 51.385(3) after the district
court continued the trial 7 days to provide adequate notice at the request of
18 the State. NRS 51.385(3) provides that when the State seeks the admission
of a statement by a child describing sexual conduct or physical abuse, and
19 "the child is unavailable or unable to testify, written notice must be given to
the defendant at least 10 days before the trial of the prosecution's intention
20 to offer the statement in evidence." Branagan fails to demonstrate that trial
counsel's performance was deficient or prejudice. The district court found
21 that any failure to waive the additional three days "would have been a futile
act on trial counsel's part" because "the court would have continued the trial
22 anyway to accommodate the proper notice." The district court also found
that notice under NRS 51.385(3) was not required because the victim
23 testified and was subject to cross-examination. See NRS 51.385(1)(b). We
conclude that the district court did not err by denying this claim.

24 Order of Affirmance, Exhibit 12, p. 2 (ECF No. 22-10, p. 3).

25 Branagan's ineffective assistance of counsel claim fails. Branagan's trial counsel
26 did not perform unreasonably. The state courts' ruling that, under the circumstances in
27 this case, notice was not required under NRS § 51.385(3) is a matter of Nevada law,
28 beyond the purview of this federal habeas court. See *Estelle v. McGuire*, 502 U.S. 62, 67-

1 68 (1991) (“[I]t is not the province of a federal habeas court to reexamine state-court
2 determinations on state-law questions.”). It is plain, therefore, that, because the notice
3 was not necessary, the waiver of three days of the ten-day notice was of no moment.
4 Branagan’s trial counsel did not err, and Branagan was not prejudiced.

5 The Court finds that the state courts’ ruling that Branagan’s federal constitutional
6 right to effective assistance of counsel was not violated was not contrary to, or an
7 unreasonable application of *Strickland*, or any other clearly established federal law as
8 determined by United States Supreme Court. The Court will deny habeas corpus relief on
9 Ground 1.

10 Grounds 2A, 2B, 3A, 3B and 3C

11 In Ground 2A, Branagan claims that he received ineffective assistance of trial
12 counsel, in violation of his federal constitutional rights, because his trial counsel failed to
13 investigate and pursue “a possible defense relating to his ‘diminished capacity’ as a result
14 of his ADA recognized disabilities and or pharmacological regime (involuntary
15 intoxication).” See Petition for Writ of Habeas Corpus (ECF No. 15), p. 5. In Ground 2B,
16 Branagan claims that his rights under the federal constitution were denied because
17 “Nevada’s failure to recognize this affirmative defense of ‘diminished capacity’ is a denial
18 of the Appellant’s [substantive] and procedural due process rights by denying
19 [meaningful] access to the courts; to wit being able to present his disability in the judicial
20 process en toto as provided under the [ADA].” See *id.* In Ground 3A, Branagan claims
21 that his rights under the federal constitution were denied because he was denied his right
22 to present evidence concerning his disability. See *id.* at 7. In Ground 3B, Branagan claims
23 that he received ineffective assistance of trial counsel, in violation of his federal
24 constitutional rights, because his trial counsel failed “to determine that [he] was suffering
25 from a disability.” See *id.* And, in Ground 3C, Branagan claims that he received ineffective
26 assistance of trial counsel, in violation of his federal constitutional rights, because his trial
27 counsel failed “to recognize that the ADA allowed [him] to delve into the details regarding
28

1 [his] mental illness and the side effects that the medications had on his state of mind, for
2 the purpose of furthering an argument regarding involuntary intoxication.” See *id.* at 8.

3 Branagan asserted these claims in his state habeas action. The state district court
4 denied these claims; the ruling included the following:

5 Defendant ... fails to allege what the desired investigation would
6 have revealed, let alone do so with any specificity. Defendant also fails to
7 allege how the desired investigation would have changed the outcome of
8 the case. Defendant merely asserts that he was taking prescription
9 medication and that trial counsel should have investigated the combined
10 effects.

11 * * *

12 Defendant does not specify what evidence should have been investigated
13 or how the evidence would have altered the outcome of the case but rather
14 makes an unsupported conclusory statement which is insufficient to support
15 his claim.

16 Further, Defendant’s claims are belied by the record because a
17 review of Defendant’s interview in the trial transcript reveals that Defendant
18 was coherent and competent.

19 * * *

20 Defendant’s claims are belied by the record. As set forth above, trial
21 counsel did raise the effects of this meditation and alleged mental health
22 conditions as they pertained to Defendant’s statement/confession for the
23 jury’s consideration. Trial counsel did so through both the cross-
24 examination of the detective and the direct-examination of Defendant. Thus,
25 trial counsel did investigate and raise this claim making Defendant’s claim
26 belied by the record.

27 * * *

28 To the extent that Defendant argues the jury should have heard his
claims of diminished capacity, mental illness, or medication, the record
shows that the jury was told this information by Defendant in his own words
during his testimony. R.T., October 14, 2010, pgs. 19, 23-24, 32, 37. The
statements occurred mostly on direct examination, thus showing that trial
counsel utilized Defendant’s claims of mental illness and the alleged effects
of his medication in his defense. Therefore, this claim and/or sub-claim is
belied by the record and not entitled to relief.

Findings of Fact, Conclusions of Law and Order, Exhibit 8, pp. 9-11 (ECF No. 22-6, pp.
10-12).

Branagan then raised these issues on the appeal in his state habeas action, and
the Nevada Supreme Court ruled as follows:

1 ... Branagan contends that trial counsel was ineffective for failing to
2 investigate medical issues relating to potential defenses. Branagan claims
3 that such an investigation would have shown that his rights were violated
4 under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132 (1990),
5 by Nevada's failure to recognize diminished capacity as a defense because,
6 under the ADA, a defendant must "be allowed to present evidence of their
7 disability *in any proceeding*." Branagan notes that "[i]t is quite possible that
8 [he] was involuntarily intoxicated." In a related argument, Branagan
9 contends that trial counsel was ineffective for failing to apply and enforce
10 the ADA in order to present a diminished capacity/involuntary intoxication
11 defense. [Footnote: Although the supplemental habeas petition filed by
12 Branagan discussed the ADA and Nevada's failure to recognize a
13 diminished capacity defense, it was not specifically alleged that trial counsel
14 was ineffective for failing to apply and enforce the ADA in order to present
15 such a defense.] Branagan fails to demonstrate that trial counsel's
16 performance was deficient or prejudice. Although "the technical defense of
17 diminished capacity is not available in Nevada," *Crawford v. State*, 121 Nev.
18 744, 757, 121 P.3d 582, 591 (1005), Branagan was not prohibited from
19 presenting evidence regarding his mental health and use of medications.
20 The district court noted that the jury did, in fact, hear about Branagan's
21 mental health and use of various medications through his own testimony on
22 direct examination. Therefore, Branagan did not demonstrate that the
23 failure to recognize the defense of diminished capacity prevented him from
24 presenting evidence of his disability. Further, the district court found that
25 Branagan failed to specify "what the desired investigation would have
26 revealed" or demonstrated that "but for counsel's errors, the result would
27 have been different." We agree and conclude that the district court did not
28 err by denying this claim.

Order of Affirmance, Exhibit 12, pp. 2-3 (ECF No. 22-10, pp. 3-4).

The state court ruling on these claims was not objectively unreasonable. Branagan was not prevented from presenting evidence regarding his mental health and his medication, and he actually did present such evidence. See, e.g., Transcript of Trial, October 14, 2010, Exhibit 2C, pp. 19, 23-24 (ECF No. 21-2, pp. 20, 24-25).

Furthermore, Branagan's position now – that mental illness or medication may have affected his actions – would not have strengthened the defense he presented at trial. Branagan testified at trial. See Transcript of Trial, October 14, 2010, Exhibit 2C, pp. 7-49 (ECF No. 21-2, pp. 8-50). Branagan claimed, essentially, that his girlfriend's five-year-old granddaughter sexually assaulted him, rather than the other way around. Branagan testified that he was sitting on his bed in his bedroom, dressing after taking a shower, with a shirt over his head, when the little girl unexpectedly entered the room, put

1 his penis in her mouth, and then ran away. See *id.* at 15-18 (ECF No. 21-2, pp. 16-19).
2 Branagan's testimony was as follows:

3 Q. What happened, if anything, next?

4 A. As I said, I was putting the T-shirt on and all of a sudden, I feel
5 something between my legs. And now – like I said, now I'm thinking it was
6 Mary because it's happened before. Excuse for the ladies. But – so I'm
7 thinking it was Mary. But when I got it over, I went, what the hell are you
8 doing? And she just looked at me and bolted out the door. I was more
9 stunned because I, I was like –

10 Q. Well, what did you either feel or observe happen?

11 A. She was, excuse the ladies, how do you put it? I mean –

12 Q. However you would –

13 A. She had her, she had her mouth on my penis. I don't know
14 how to put that.

15 Q. And how – what were you thinking when you noticed that? Or
16 what was your reaction to that?

17 A. What the hell are you doing. And she just looked at me and
18 ran out. And, like I said, her mother was on her way to pick her up. I thought
19 she had already left.

20 *Id.* at 17-18 (ECF No. 21-2, pp. 18-19); see also *id.* at 30-31, 33 (ECF No. 21-2, pp. 31-
21 32, 34) (describing the incident in a similar manner on cross-examination). Given
22 Branagan's position at trial, and his testimony, it is inconceivable that further evidence
23 regarding his mental health or medication would have had any impact on the jury's view
24 of the case.

25 There is no showing that Branagan's counsel erred in not further investigating
26 Branagan's mental health or his medication, or in not presenting further evidence
27 regarding those matters to the jury. Branagan has never specified what any further
28 investigation would have revealed, what different evidence should have been presented
to the jury, or how it could possibly have made a difference, given his testimony about
what happened with the little girl.

Moreover, Branagan cites no Supreme Court precedent – and the Court knows of
none – supporting his claim that his federal constitutional rights were violated because

1 Nevada does not recognize the diminished capacity defense. See *Clark v. Arizona*, 548
2 U.S. 735, 756-79 (2006) (rejecting due process challenge based on Arizona's non-
3 recognition of diminished capacity defense).

4 The state courts' ruling on these claims was not contrary to, or an unreasonable
5 application of *Strickland*, or any other clearly established federal law as determined by
6 United States Supreme Court. The Court will deny habeas corpus relief on Grounds 2A,
7 2B, 3A, 3B and 3C.

8 Ground 4

9 In Ground 4, Branagan claims that he received ineffective assistance of trial
10 counsel, in violation of his federal constitutional rights, "during [his trial counsel's] cross-
11 examination of the State's witnesses." See Petition for Writ of Habeas Corpus (ECF No.
12 15), p. 10. Branagan points, specifically, at his trial counsel's cross-examinations of the
13 victim and her mother. See Reply (ECF No. 29), pp. 6-7.

14 Branagan asserted this claim in his state habeas petition, and the state district
15 court ruled as follows:

16 The fact that Defendant is not happy with the results of trial counsel's
17 examination does not mean that counsel was ineffective. Defendant's
18 claims are belied by the record because trial counsel did in fact cross-
19 examine the witnesses at the trial using the preliminary hearing transcript.
20 See R.T., October 12, 2010, pgs. 214-222; R.T., October 13, 2010, pgs. 82-
21 93. Trial counsel impeached both the victim and her mother, Victoria, using
22 their previous statements, their previous descriptions of the incident, how
23 the victim had previously described the testimony, and other topics. *Id.*
24 Further, trial counsel also asked about previous testimony in front of a "lady
25 judge;" while he did not call it the preliminary hearing, he did ask about the
26 testimony in a manner the witness would understand. *Id.* Trial counsel
27 challenged the victim with her previous recantation and, although he had to
28 rephrase his questioning due to an objection, he was successful in getting
Victoria to admit that her previous testimony/statements about the way her
daughter described the incident were in fact her words as a protective
mother rather than a word-for-word description of what her daughter said.
Id. Further, the district court even noted that trial counsel had impeached
the victim and that the jury had the information regarding her prior testimony
before them because the court had allowed it in as a recorded recollection
due to the victim's young age. R.T., October 13, 2010, pg. 108. Thus,
Defendant's claims that trial counsel did not cross-examine the witnesses
effectively are belied by the record; further his claim that trial counsel failed
to investigate and/or review the preliminary hearing transcript for
impeachment material is also belied by the record.

1 Defendant's citations to *United States v. Cronin*, 466 U.S. 648
2 (1994), *Bell v. Cone*, 122 S.Ct. 1843 (2002), *Gersten v. Senknowski*, 426
3 F.3d 588 (2nd Cir. 2005), and *Casey v. Frank*, 246 F.Supp.2d 1000
4 (E.D.Wis. 2004) are inapplicable because the record shows that counsel did
5 investigate and did provide a meaningful cross-examination using the
strategy that counsel deemed appropriate based on his knowledge,
experience, and investigation of the case. Thus, trial counsel's action was
a well-reasoned strategic decision which is presumed to be and was
effective assistance of counsel.

6 Findings of Fact, Conclusions of Law and Order, Exhibit 8, pp. 12-13 (ECF No. 22-6, pp.
7 13-14). And, on appeal, the Nevada Supreme Court affirmed this ruling, explaining:

8 ... Branagan contends that trial counsel was ineffective for failing to
9 investigate and use the preliminary hearing transcript to impeach the child-
10 victim and her mother on cross-examination. Branagan argues that their
11 trial testimony was inconsistent and differed greatly from their testimony at
12 the preliminary hearing. Branagan fails to demonstrate that trial counsel's
13 performance was deficient or prejudice. The district court found that
14 Branagan's claims were belied by the record because "trial counsel did in
15 fact cross-examine the witnesses at the trial using the preliminary hearing
16 transcript." The district court noted that counsel impeached both the victim
17 and her mother "using their previous statements, their previous descriptions
of the incident, how the victim had previously described the testimony, and
other topics." The district court determined that counsel provided "a
meaningful cross-examination" of the two witnesses indicating "a well-
reasoned strategic decision." See *generally Rhyne v. State*, 118 Nev. 1, 8,
38 P.3d 163, 167-68 (2002) (explaining that trial tactics are within counsel's
control). The district court also determined that Branagan's allegations of
prejudice amounted to "unsupported conclusory statements." We agree and
conclude that the district court did not err by denying this claim.

18 Order of Affirmance, Exhibit 12, pp. 3-4 (ECF No. 22-10, pp. 4-5).

19 The state courts' ruling on this claim was not objectively unreasonable. The record
20 reflects that Branagan's trial counsel's cross-examination of the victim (see Transcript of
21 Trial, October 12, 2010, Exhibit 2A, pp. 214-24 (ECF No. 20-2, pp. 225-35)) and her
22 mother (see Transcript of Trial, October 13, 2010, Exhibit 2B, pp. 82-92 (ECF No. 21-1,
23 pp. 83-93); see also Transcript of Trial, October 13, 2010, Exhibit 2B, pp. 31-32 (ECF No.
24 21-1, pp. 32-33) (cross-examination of victim's mother in NRS § 51.385 hearing)) were
25 reasonably effective; Branagan has not shown his trial counsel's performance to have
26 been unreasonable, and he has not shown prejudice.

1 The state courts' ruling on this claim was not contrary to, or an unreasonable
2 application of *Strickland*, or any other clearly established federal law as determined by
3 United States Supreme Court. The Court will deny habeas corpus relief on Ground 4.

4 Ground 5

5 In Ground 5, Branagan claims that he received ineffective assistance of trial
6 counsel, in violation of his federal constitutional rights, because his trial counsel "failed to
7 object to the testimony of victim's mother, whose testimony was based upon 3rd or 4th
8 party hearsay and admitted to be perjured." See Petition for Writ of Habeas Corpus (ECF
9 No. 15), p. 12.

10 The state district court rejected this claim, as follows, in Branagan's state habeas
11 action:

12 As for Defendant's allegations that trial counsel should have, or could
13 have, objected on hearsay grounds, these claims are barred by the law of the case
14 doctrine. Defendant's relief is barred by the law of the case
15 doctrine because the Nevada Supreme Court has already considered his
16 claims and denied the relief sought herein. On appeal Defendant contended
17 that Victoria's statements were improperly admitted. The Nevada Supreme
18 Court found that the statements were properly admitted under hearsay
19 exceptions in NRS 51.385.

20 * * *

21 These claims are also belied by the record and seek futile action;
22 thus trial counsel cannot be ineffective. Specifically, the district court held
23 the proper NRS 51.385 hearing prior to admitting the testimony. R.T.,
24 October 13, 2010, pgs. 1-56. The district court found the testimony
25 admissible under NRS 51.385. As such, any hearsay objection would have
26 been futile. Therefore, Defendant cannot show that his counsel was
27 ineffective for obtaining a NRS 52.385 hearing and not making futile
28 objections.

29 Similarly, Defendant cannot show prejudice under *Strickland's*
30 second prong because he cannot show that had trial counsel attempted the
31 allegedly necessary objections the outcome would have been any different.

32 Findings of Fact, Conclusions of Law and Order, Exhibit 8, p. 15 (ECF No. 22-6, p. 16);
33 see also Transcript of Trial, October 13, 2010, Exhibit 2B, pp. 2-55 (ECF No. 21-1, pp. 3-
34 56) (NRS § 51.285 hearing). The Nevada Supreme Court affirmed this ruling, stating:

35 ... Branagan contends that trial counsel was ineffective for failing to
36 raise a hearsay objection to the testimony of the victim's mother regarding
37 the victim's out-of-court statements. Branagan claims that counsel did not

1 object to the testimony “because he clearly never read the case file or
2 investigated the case.” Branagan fails to demonstrate that trial counsel’s
3 performance was deficient or prejudice. The district court determined that
4 an objection on hearsay grounds would have been futile because, after the
5 trustworthiness hearing conducted outside the presence of the jury, the
6 mother’s testimony was deemed admissible pursuant to NRS 51.385. See
7 *Ennis v. State*, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006) (stating that
8 counsel cannot be deemed ineffective for failing to make futile objections).
The district court also determined that Branagan failed to demonstrate that
the outcome of the trial would have been different had counsel objected.
Finally, in rejecting this claim, the district court noted that in Branagan’s
direct appeal, we found that the district court did not abuse its discretion by
admitting the challenged testimony. See *Branagan v. State*, Docket No.
57523 (Order of Affirmance, November 18, 2011). We agree and conclude
that the district court did not err by denying this claim.

9 Order of Affirmance, Exhibit 12, pp. 4-5 (ECF No. 22-10, pp. 5-6).

10 In light of the state courts’ ruling that the victim’s mother’s testimony was
11 admissible under Nevada evidence law, it is clear that the objection envisioned by
12 Branagan would have been futile. The Nevada courts’ ruling on the admissibility of the
13 testimony was a matter of state law, and is not subject to review in this federal habeas
14 action. See *Estelle*, 502 U.S. at 67-68. Branagan has not shown that his counsel
15 performed unreasonably, or that he was prejudiced. The Nevada courts’ ruling was not
16 objectively unreasonable. The Court will deny relief on Ground 5.

17 Branagan’s Motion for Appointment of Counsel

18 On June 14, 2018, Branagan filed a second motion for appointment of counsel
19 (ECF No. 36). “Indigent state prisoners applying for habeas corpus relief are not entitled
20 to appointed counsel unless the circumstances of a particular case indicate that appointed
21 counsel is necessary to prevent due process violations.” *Chaney v. Lewis*, 801 F.2d 1191,
22 1196 (9th Cir. 1986) (citing *Kreiling v. Field*, 431 F.2d 638, 640 (9th Cir. 1970) (per
23 curiam). The court may, however, appoint counsel at any stage of the proceedings “if the
24 interests of justice so require.” See 18 U.S.C. § 3006A; see also Rule 8(c), Rules
25 Governing § 2254 Cases; *Chaney*, 801 F.2d at 1196.

26 Branagan previously requested appointment of counsel, on January 10, 2017
27 (ECF No. 27). That motion was denied on January 13, 2017 (ECF No. 28). It remains the
28 Court’s view that appointment of counsel is not warranted.

1 Certificate of Appealability

2 The standard for issuance of a certificate of appealability calls for a “substantial
3 showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c). The Supreme Court
4 has interpreted 28 U.S.C. § 2253(c) as follows:

5 Where a district court has rejected the constitutional claims on the
6 merits, the showing required to satisfy § 2253(c) is straightforward: The
7 petitioner must demonstrate that reasonable jurists would find the district
court’s assessment of the constitutional claims debatable or wrong.

8 *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); see also *James v. Giles*, 221 F.3d 1074,
9 1077-79 (9th Cir. 2000). The Supreme Court further illuminated the standard in *Miller-El*
10 *v. Cockrell*, 537 U.S. 322 (2003). The Court stated in that case:

11 We do not require petitioner to prove, before the issuance of a COA,
12 that some jurists would grant the petition for habeas corpus. Indeed, a claim
13 can be debatable even though every jurist of reason might agree, after the
COA has been granted and the case has received full consideration, that
14 petitioner will not prevail. As we stated in *Slack*, “[w]here a district court has
rejected the constitutional claims on the merits, the showing required to
15 satisfy § 2253(c) is straightforward: The petitioner must demonstrate that
reasonable jurists would find the district court’s assessment of the
constitutional claims debatable or wrong.”

16 *Miller-El*, 537 U.S. at 338 (quoting *Slack*, 529 U.S. at 484).

17 The Court has considered all of Branagan’s claims with respect to whether they
18 satisfy the standard for issuance of a certificate of appeal, and determines that none of
19 them do. The Court will deny Branagan a certificate of appealability.

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IT IS THEREFORE ORDERED that petitioner's motion for appointment of counsel (ECF No. 36) is **DENIED**.

IT IS FURTHER ORDERED that the Petition for Writ of Habeas Corpus in this case (ECF No. 15) is **DENIED**.

IT IS FURTHER ORDERED that the petitioner is denied a certificate of appealability.

IT IS FURTHER ORDERED that the Clerk of the Court shall **ENTER JUDGMENT** **ACCORDINGLY.**

DATED THIS 7 day of August, 2018.

GLORIA M. NAVARRO,
CHIEF UNITED STATES DISTRICT JUDGE